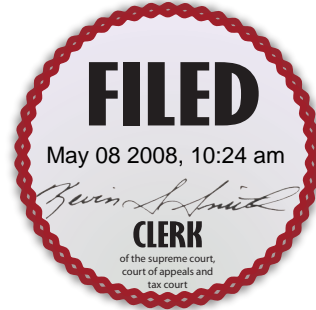


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

MARY ANN SMITH-DOBBEN,

Appellant-Petitioner,

vs.

RICHARD LEE DOBBEN,

Appellee-Respondent.

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No. 46A03-0711-CV-506

APPEAL FROM THE LAPORTE SUPERIOR COURT
The Honorable Steven E. King, Judge
Cause No. 46D02-0401-DR-5

May 8, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Mary Ann Smith-Dobben (“Mother”) appeals the trial court’s order that modified custody of the parties’ minor children by granting Richard Lee Dobben, M.D. (“Father”) sole legal and physical custody of the parties’ two younger children and granting Mother sole legal and physical custody of the oldest child.

ISSUES

1. Whether the trial court order erred in modifying custody based, in part, on the failure of Mother to communicate when Father did not list communication as a reason for modification in his definite statement.
2. Whether the trial court order erred in modifying custody by failing to interview the parties’ two younger children when Mother did not call the children as witnesses or request an in-camera interview.
3. Whether the evidence before the trial court supports its conclusion that modification of custody was in the best interest of the children.

FACTS

On September 1, 2005, the trial court entered its decree dissolving the twenty-year marriage of Father and Mother. As to their three children -- J., born 1/12/1989; E., born 8/11/1992; and D., born 6/28/1996, based upon “the parties’ oral stipulation in open court,” the order granted Mother “primary residential or physical custody,” but granted Father and Mother “joint legal custody.” (Mother’s App. 12).

On December 20, 2006, Father sought modification of custody, alleging that “it [wa]s in the best interest of the children to reside with him.” (Mother’s App. 15). The trial court set a hearing for March 28, 2007. On March 27, 2007, Mother filed a response to Father’s petition, denying that it was in the best interest of the children to reside with

Father or that “any modification [wa]s appropriate.” (Mother’s App. 16). Mother further asserted that Father’s petition had failed to allege a substantial change in a statutory factor, citing Indiana Code sections 31-17-2-21 and 31-17-2-8.¹

On March 28, 2007, the trial court ordered Father to file a “more definite statement of the bases upon which” he sought a custody modification, and set the matter for hearing on June 27, 2007. In response, Father filed a statement wherein he alleged a substantial change in the children’s interaction and interrelationship with the parties and their siblings; an investigation by the Department of Child and Family Services of “filthy and unsanitary” conditions at Mother’s residence (Mother’s App. 21); deteriorated relationships between Mother and the children; an investigation by a truant officer of J.’s failure to attend school; a decline in J.’s grades and his personal and physical development; the children’s deteriorated adjustments to home, school and community; the children’s anxiety about Mother’s stated intention to move them from their schools, friends, and community; the “general disarray and confusion that exists in the household,” (Mother’s App. 22); and the negative impact of the foregoing on the children’s mental and physical health.

The trial court received evidence at the hearing on June 27, 2007. Father, Mother, seventeen-year-old J., and the truant officer from J.’s school testified. Photographs and reports of the living conditions in Mother’s residence were admitted into evidence, along with reports of J.’s recent school attendance and academic performance.

¹ I.C. § 31-17-2-21 provides that a child custody order may not be modified unless such is in the best interests of the child and there has been a substantial change in at least one of statutory factors (found at I.C. § 31-17-2-8) that are considered in making an initial custody determination.

On June 29, 2007, the trial court issued its order concluding that there had been a substantial change in one or more of the statutory factors, and that modification of the existing custody would be in the best interests of the parties' three children. The trial court held that its original "order providing that the parties share joint legal custody of the three minor children should be modified for the reason that [Mother] ha[d] established her total unwillingness to communicate with [Father] in any meaningful fashion regarding matters regarding the three children." (Mother's App. 6). The trial court noted the following:

- Mother changed J.'s doctor of many years standing, without notification to or discussion with Father;
- Mother agreed to placement of J. on the medication Prozac, without notification to or discussion with Father;
- Mother failed to apprise Father of meaningful extracurricular school events, including the fall 2006 sports banquet and March 2007 band concert; and
- Mother failed to return telephone calls from Father regarding the children.

As a result, the trial court concluded that Mother's failure to engage in two-way communication had rendered joint legal custody "a mockery," and vacated its original "order granting the parties joint legal custody of the three children." (Mother's App. 6, 7).

The trial court found that there were substantial changes that had occurred since entry of the original custody order, and that it was "no longer in the best interest of the children" for Mother to "serve as the primary residential parent of all three children," specifically finding that Mother had

- by “acts of commission and omission, engaged in a pattern of behavior and attitude toward” Father that had “as intended, alienated the affection of the three children toward [Father] in varying degrees;
- by her “conduct, behavior and attitude,” caused J.’s “virtual repudiation of his relationship with his father”; and
- by her “unwillingness to speak with” Father regarding their shared parental responsibilities, “undermine[d] the credibility” of her testimony in certain respects; and

that “if the existing custody order remained intact,” it was “probable” that Mother would “succeed in totally alienating the feelings of E[.] and D[.] for” Father. (Mother’s App. 7). In addition, the trial court found and concluded that custody of all three children with Mother was not in their best interest because Mother had “on various occasions, allowed the custodial premises to fall into an unsanitary and wholly cluttered living environment that . . . prompted concern and intervention by child welfare authorities”; and that Mother had “failed to initiate contact with school authorities during J[.]’s extended period” of 33 days’ absence from school in the fall of 2006, or to “engage in the process of obtaining school assignments and homework for” him, resulting in “intervention by the school’s truant officer and coercive measures to obtain [Mother]’s cooperation in meeting J[.]’s needs.” (App. 8).

In summary, the trial court concluded that it “would be in the best interests of” E. and D. that Father be “granted sole legal and custody” of them; however, it concluded that “given the age” of J., his current deep animosity toward Father and disinterest in re-establishing a relationship with Father, and Mother’s “tacit encouragement” of J. in this regard, an order granting custody of J. to Father “would likely be counter-productive and

a catalyst for continued turmoil in the family.” *Id.* Accordingly, the trial court granted Mother “sole legal and physical custody” of J. *Id.*

DECISION

Pursuant to Indiana law, “a court may not modify a child custody order unless modification is in the child’s best interests and there is a substantial change in one of several factors that a court may initially consider in determining custody,” factors found at Indiana Code section 31-17-2-8.² *Kirk v. Kirk*, 770 N.E.2d 304, 306 (Ind. 2002) (citing Ind. Code § 31-17-2-21). Appellate review of a custody modification applies the “abuse of discretion” standard, granting deference to the trial court’s perspective. *Id.* at 307. This standard reflects that the appellate court is

in a poor posture to look at a cold transcript of the record, and conclude that the trial judge, who saw the witnesses, observed their demeanor, and scrutinized their testimony as it came from the witness stand, did not properly understand the significance of the evidence, or that he should have found its preponderance or the inferences therefrom to be different from what he did.

² The statute provides that the trial court shall consider all relevant factors, including the following:

- (1) The age and sex of the child.
- (2) The wishes of the child's parent or parents.
- (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
- (4) The interaction and interrelationship of the child with:
 - (A) the child's parent or parents;
 - (B) the child's sibling; and
 - (C) any other person who may significantly affect the child's best interests.
- (5) The child's adjustment to the child's:
 - (A) home;
 - (B) school; and
 - (C) community.
- (6) The mental and physical health of all individuals involved.
- (7) Evidence of a pattern of domestic violence by either parent.
- (8) Evidence that the child has been cared for by a de facto custodian

I.C. § 31-17-2-8.

Id. Accordingly, our Supreme Court explained, “[o]n appeal, it is not enough that the evidence might support some other conclusion, but that it must positively require the conclusion contended for by appellant before there is a basis for reversal.” *Id.* In other words, we set aside an order modifying child custody only when it “is clearly erroneous, and we will not substitute our own judgment if any evidence or legitimate inferences support the trial court’s judgment.” *Id.*

1. Notice that Mother-Father Communication an Issue

Mother argues that she was denied due process because after her “motion under Trial Rule 12(E) for a more definite statement” had been granted, and the trial court had ordered Father to file a more definite statement alleging a substantial change warranting modification of the original custody order, his responsive submission did not “specify a breakdown in communication as a ground for change of custody.” Mother’s Br. at 9. Accordingly, she continues, she was “deprived” of the “opportunity to provide the court with evidence that [F]ather was informed of the children’s activities by [M]other’s emails, communications directly from the children and through the school website.” *Id.* We find her argument unpersuasive.

First, Mother’s Appendix contains no motion for a more definite statement. Her response to Father’s petition for modification of custody asserted as an “affirmative defense” that Father “fail[ed] to allege any substantial change in any factor specified in IC 31-1-2-8 as required by IC 31-17-2-21.” Mother’s Br. at 18. Moreover, the statute does not require that the petition for modification allege a substantial change in a

statutory factor; rather the statute requires that the trial court so find in order to effect a modification. Finally, and dispositive herein, we find that Father's responsive submission expressly asserted a substantial change as to "the provisions of I.C. 31-17-2-8(4)(A)(B) and (C)."³ (Mother's App. 21). Thus, Father's submission alleged a substantial change in the statutory provision concerning the interaction and interrelationship of the children with himself and Mother. Such interaction would necessarily include communication not only between the children and the parties but between the parties themselves – particularly when the parties have joint custody of the children.⁴

In addition, as Father notes, his counsel's opening statement began by asserting Mother's "resistance to telephone" communication with him "since the entry of the decree," further asserted that "the problem of communication" had led to J.'s total alienation from Father, and expressed his fear that if Mother "continues to be custodial parent, that eventually he will lose contact with all his children and that the only possible way that these children could have two parents is if [Father] takes control of the custody and then is able to make sure those children spend time and substantial time with their mother as they should." (Tr. 8, 9). Thus, at the outset of the hearing, it was clear that Father asserted that the breakdown in communication between the parties was at issue,

³ This statutory provision is the factor of "interaction and interrelationship of the child with: the child's parent or parents; the child's sibling; and any other person who may significantly affect the child's best interests." I.C. § 31-17-2-8(4).

⁴ A factor for the trial court's consideration in a joint custody determination, in addition to the parties' agreement to that arrangement, is "whether the persons awarded joint custody are willing and able to communicate and cooperate in advancing the child's welfare." I.C. § 31-17-2-15(4).

and Mother did not object or seek a continuance on the basis that she was unaware of this issue.

Mother admitted that she would not answer telephone calls from Father or return them. Mother admitted that she had not discussed with him about changing J.'s physician or J.'s treatment with the medication Prozac, and that she had not advised Father of J.'s sports banquet or band concert. In her testimony, Mother did not attempt to explain or qualify the lack of communication by testifying that she had in fact emailed Father regarding the medical matters or J.'s school events.⁵ Further, when pressed as to what impact she thought it might have on her children "in terms of communicating with their father when they see that you do not communicate with him," Mother testified that she did not "see how that affects them at all." (Tr. 111).

We find that the record establishes that Mother had been apprised that Father was asserting that there had been a substantial change in the parties' communication with respect to the children. Further, Mother does not challenge the trial court's conclusion that there had indeed been a breakdown in the parties' communication, and we find the record to fully support that conclusion.

2. Wishes of E. and D.

Mother also argues that the custody modification order must be reversed because the trial court failed "to even consider the wishes of the children whose custody was

⁵ Father testified that he had learned of school activities from E. and D., from others in the community, and from consulting the children's school websites. However, the fact that Father learned of such from other sources does not mitigate against Mother's continuing failure to provide Father with this information.

changed.” Mother’s Br. at 11. Mother reminds us that a “relevant factor” for consideration in the initial custody determination is “the wishes of the child, with more consideration given to the child’s wishes if the child is at least fourteen (14) years of age.” I.C. § 31-17-2-8(3). Mother then notes that at the time of the modification hearing, E. was fourteen years of age, and that the trial court talked with neither E. nor eleven-year-old D.

Mother cites only *Cunningham v. Cunningham*, 787 N.E.2d 930 (Ind. 2003) in support of her argument on this issue. In *Cunningham*, the father requested that the trial court conduct an in camera interview with the parties’ children on his petition for modification of custody. The trial court held that it would do so only if the parties agreed to the interview of the children being without the parties’ presence or the presence of their counsel and “without it being reported.” 787 N.E.2d at 937. The mother refused to agree, and the trial court did not interview the children. We held that the trial court’s decision to not conduct the in camera interview was within its discretion.

Here, Mother did not ask the trial court to speak with E. and D. concerning their wishes as to custody. Thus, the import of *Cunningham* to this case is not clear. Moreover, we find no holding in *Cunningham* that the trial court must ascertain the wishes of a child in making a custody modification determination. Further, we find no authority for the proposition that the trial court lacks the discretion to make a custody modification determination without ascertaining the wishes of the child concerned. Therefore, Mother’s argument in this regard fails.

3. Whether Evidence Supports the Modification Ordered

Finally, Mother argues that the trial court's order must be reversed because even accepting the "uncontradicted evidence and the court's findings of fact," we must conclude "that the children suffered no harm." Mother's Br. at 14. We cannot agree, as the showing of "harm" is not a necessary finding for an order of custody modification. Further, we cannot accept the implicit proposition that it poses no harm to children to be subjected to actions by one parent that alienate them from the other parent.

Mother disputes none of the trial court's factual findings, and all are supported by the evidence of record. The findings amply support the trial court's conclusion that there had been substantial changes in circumstances, and that it was in the best interest of E. and D. for Father to be granted physical and legal custody of them, and in the best interest of J. that Mother be granted physical and legal custody of him.

Affirmed.

NAJAM, J., and SHARPNACK, Sr. J., concur.